IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	
JAKE KELLY	:	**NO. 04-605**

DuBOIS, J. **AUGUST 29, 2006**

M E M O R A N D U M

I. INTRODUCTION

On September 28, 2004, a grand jury sitting in the Eastern District of Pennsylvania charged Jake Kelly in a one-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and § 924(e). On July 21, 2005, a jury found Kelly guilty as charged after a three-day trial.

Presently before the Court is Kelly's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Kelly argues that a new trial is warranted because (1) trial counsel was ineffective; (2) the guilty verdict was against the weight of the evidence; (3) the Court erred by excluding Kelly's statement that "someone threw the gun at [him]"; and (4) newly discovered evidence – the testimony of Victor Jones – would probably result in his acquittal. The Court held an evidentiary hearing on the motion on June 8, 2006.

For the reasons set forth below, the Court grants the motion in part, denies the motion in part, and dismisses the motion in part. Specifically, the Court (1) dismisses without prejudice the claim of ineffective assistance of counsel; (2) denies the claim that the verdict was against the weight of the evidence and that the Court erred in its evidentiary ruling; and (3) grants the motion for a new trial on the basis of newly discovered evidence.

II. OVERVIEW OF KELLY'S JURY TRIAL

Kelly's trial before a jury began on July 19, 2005. Before the trial began, the government moved in limine to exclude Kelly's exculpatory statement that "someone threw the gun at [him]." The Court preliminarily ruled that defense counsel could not inquire about the statement as either an excited utterance or a present sense impression because of the absence of foundation evidence. Trial Transcript, July 19, 2005, 8-17. The Court ruled that, before introducing the statement, defense counsel would have to present evidence on the time lapse between the alleged throwing of the gun and Kelly's statement. Id. At trial, defense counsel neither attempted to develop evidence concerning the time lapse, nor attempted to introduce the statement.

The government built its case on the testimony of four witnesses: Philadelphia Police Corporal Raymond Drummond, Police Officer Donna Stewart, Police Officer Brant Miles, and Police Officer Ernest Bottomer. Officers Drummond, Stewart, and Miles testified that during the early hours of May 1, 2004, they participated in an open inspection to determine whether there was any illegal activity at Café Breezes, a bar located at 5131 Columbia Avenue, Philadelphia, Pennsylvania. Officer Stewart testified that, some time after she entered, she observed Kelly. Specifically, she testified:

> When I returned to the front of the bar the defendant was leaned over, crunched over in his seat with his hands below the bar where I couldn't see them and he had stopped fidgeting. He kept moving his head around, he kept looking around but he had stopped moving his body. . . . .
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> . . .
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> When I returned to the front of the bar I stood there for maybe another minute or two, just keeping an eye on everybody, keeping an eye on the defendant. A Vice Officer asked someone for their ID much further down the bar. It was at that point that the defendant reached quickly towards his back. At that point I stopped him, I put my hands on him, I had him put his hands on the bar. I walked behind the defendant so I was standing between the defendant and the female to his left and at that point I had him stand up. As he stood up the gun fell from his lap, it was about mid-thigh. It fell down along his left

> leg, it hit the brass chair rail at the base of the bar with a loud metal clang and then it landed on the floor.
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> I yelled "Gun." Other officers rushed up towards me, they placed handcuffs on the defendant and I recovered the weapon from the floor.

Trial Transcript, July 20, 2005, 76-78. Officer Bottomer testified that the gun at issue was a firearm as defined by federal law and the serial number on the gun was obliterated.

Only Officer Stewart's testimony connected Kelly with the gun at issue. No other officer or patron at Café Breezes testified to seeing Kelly with the gun. Kelly did not testify, and the only evidence he offered was series of photographs of the Café Breezes bar.

At trial, the parties entered into two stipulations: (1) prior to May 1, 2004, Kelly had been convicted of a crime punishable by imprisonment for more than one year within the meaning of 18 U.S.C. § 922(g), and (2) the firearm in question was manufactured outside of Pennsylvania.

On July 21, 2005, the jury found Kelly guilty of possession of a weapon by a convicted felon.

III. PROCEDURAL HISTORY

By pro se letter dated July 27, 2005, Kelly requested a sixty-day extension to file a Motion for a Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29. The Court granted that request by Order dated July 28, 2005, but Kelly never filed a Rule 29 motion.

On August 1, 2005, newly retained counsel, Mark E. Cedrone, entered an appearance for Kelly.[1] On the same date, Cedrone filed a Motion for New Trial and Leave to Supplement pursuant to Federal Rule of Criminal Procedure 33. By Order dated August 3, 2005, the Court granted Kelly leave to supplement his Rule 33 Motion.

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[1] A week later, on August 8, 2005, the Court entered an order granting the motion of Kelly's trial counsel to withdraw.

On October 6, 2005, Kelly filed a counseled supplemental motion for a new trial. With respect to one of the issues raised – the newly discovered evidence claim – Kelly attached to the motion a statement by Ms. Kemahsiah Gant. Gant's statement recounted her conversation with Victor Jones about the gun which Kelly was convicted of possessing. According to Gant, Jones admitted that, during the early hours of May 1, 2004 at Café Breezes, he threw the gun at issue on the floor, not Kelly. Gant's statement reads, in relevant part:

> Sometime during the summer months of 2005, I believe in July, I was talking to Victor Jones. . . . During our conversation we were talking about Jake Kelly and the gun charge. He told me that gun was not Jake's gun the police found. I asked who [sic] gun was it. He said he had the gun. When the police came in he got nervous and threw it down on the floor. I asked why didn't you say anything and he never answered. After hearing this I did not know what to do. I know Jake's girlfriend Jackie Cephas and thought about telling her. I was concerned about ratting out Victor too. A few weeks later I finally told Jackie what Victor had said about the gun not being Jakes [sic]. Jackie asked me to talk to her boyfriends [sic] attorney and I refused to at first. I finally decided it was the right thing to do. This statement was given on 10-4-05 [October 4, 2005] and is true to the best of my knowledge.

Ex. A, Def. Supp. Post-Verdict Motions. Kelly argues that Jones's admission about the gun is newly discovered evidence of his innocence, and warrants a new trial.

Four months later, on February 6, 2006, the government filed a response to Kelly's motion for a new trial. Then, on February 10, 2006, the government moved for trial subpoena under Federal Rule of Criminal Procedure 17(c). The subpoena sought access to "the Federal Bureau of Prisons for the production of all tapes of non-privileged conversations between the defendant and other parties for the period June 1, 2005 through the present." Gov't Motion for Trial Subpoena ¶ 3. The government explained that the subpoena was part of its continuing investigation of the allegedly newly discovered evidence in Kelly's Rule 33 Motion. By letter dated March 9, 2006, Kelly notified the Court that he did not intend to oppose the government's motion. By Order dated March 9, 2006, the Court granted the government's motion for trial

subpoena.

On March 14, 2006, Kelly filed a reply to the government's response. His reply argued that his claim of ineffectiveness of counsel could be litigated on direct appeal, and that the Court could conclude that the verdict in his case was not supported by the weight of the evidence. Kelly also contended that his claim for a new trial based on newly discovered evidence warranted, at the very least, an evidentiary hearing.

The Court scheduled an evidentiary hearing on Kelly's claim of newly discovered evidence on June 8, 2006. The Court ordered Gant and Jones to attend that hearing, and authorized defense counsel to issue subpoenas to ensure their appearances. The Court further stated that "[t]he subpoena issued for Mr. Jones should provide, inter alia, that the Court will appoint counsel from the Federal Defender Association to represent him at the Hearing if he does not have an attorney." Order, May 4, 2006.

IV. EVIDENTIARY HEARING ON JUNE 8, 2006

At the evidentiary hearing on June 8, 2006, Kelly presented three witnesses, Kemahsiah Gant, Jacquelyn Cephas, and Victor Jones, in that order. The government presented one witness, Philadelphia Police Officer Clarence Clark. The witnesses were sequestered until after their testimony. Hearing Transcript, June 7, 2006, 11.

Because the Court's decision to grant Kelly's motion for a new trial is based on the evidence presented at the hearing on June 8, 2006, the Court summarizes the testimony of the four witnesses in some detail, as follows:

A. Testimony of Kemahsiah Gant

Gant described Café Breezes, where Kelly's arrest took place, as a neighborhood bar where she regularly spent time with her friends, Cephas, Jones, and Kelly. Id. at 18-19. She

learned of Kelly's arrest of May 1, 2004 soon after it occurred. Id. at 19-21. She came to Court on July 21, 2005 when Kelly's verdict was read to give him and Cephas moral support. Id. at 21-23.

About a week after the verdict, around July 28, 2005, Gant stopped by to visit Jones at his home. Id. at 24-26. She told Jones about the guilty verdict in Kelly's case. Id. at 26. Jones responded by saying, "I have something to tell you." Id. at 27. When she asked, "what?," Jones said, "It wasn't Jake's gun." Id. Jones then revealed that he threw the gun on the floor. Id. at 29. When she asked him, "Well, why didn't you say anything?," he never responded. Id. 29-30. Throughout the conversation, Jones spoke seriously. Id. at 50.

After learning this information, Gant hesitated about sharing it with anyone. Id. at 30-35. She did not want to "rat" Jones out. Id. at 31. She also feared getting involved in the legal system because some years ago,[2] when she was a witness of an attempted murder, her life was threatened and her son was taken away. Id. at 33, 48.

Nevertheless, about three weeks later, some time in August 2005, Gant called Cephas, who was Kelly's girlfriend, to tell her what Jones had revealed because that was "the right decision." Id. at 31-33, 53. Cephas asked Gant whether Gant would be willing to talk with Kelly's lawyer. Id. at 33. Gant initially refused,[3] id., but at some point in September 2005, she

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[2] The record is unclear as to when Gant witnessed the attempted murder. She stated, "ten years ago . . . when I was a witness . . . .," id. at 54, and "approximately two years ago I was a witness of attempted murder . . . .," id. at 33.

[3] Gant explained: "The issue that I had was Victor Jones is my friend, Jake Kelly's my friend. I didn't want to be here today to testify for anybody. I've been through this before, my life was threatened, my kids were taken away or my son at the time was taken away, I did not want to get involved to help somebody or to get somebody in trouble, I didn't want to be a part of this, period." Id. at 48.

changed her mind and called the office of Kelly's defense counsel. Id. at 35, 56. Thereafter, Willard Brown, an investigator for Kelly's defense counsel, returned Gant's phone call and they arranged to meet on October 4, 2005 during Gant's lunch hour. Id. at 35, 56. On that date, Gant shared with Brown the substance of her conversation with Jones, and Brown helped Gant prepare a statement. That statement was attached to Kelly's supplemental motion for a new trial, dated October 6, 2005. Gant did not return the telephone calls of government investigator Chris Lee. Id. at 56-58.

Before ending her testimony, in response to questions from the Court, Gant testified that Cephas never discussed Kelly's case with her, except to let her know when the verdict would be read. Id. at 21-23, 63. Likewise, Gant testified that she never discussed the case with Jones until about a week after the verdict, around July 28, 2005, and that Kelly never discussed the case with her. Id. at 63. She explained that she did not ask Cephas, Kelly, or Jones questions about the case because she "did not want to get involved at all." Id.[4]

B. Testimony of Jacqueline Cephas

Cephas testified that Kelly was her boyfriend of approximately eight years, and that she was a friend of Gant and Jones. Id. at 67-70. She testified that the four of them socialized at Café Breezes. Id. at 70.

When asked why Kelly was arrested, Cephas testified that it was her understanding that

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[4] Gant testified:

> I had my own issues at the time so I really didn't have time to worry about what was going on with Jake and Jackie and I had my own issues at the time. So I really didn't – I'm not going to say care, it wasn't my concern. It wasn't on my priority list to figure out what was going on, you know, with Jake and his case. I just had my own issues.

Id. at 63-64.

he was arrested because, on May 1, 2004, at Café Breezes, "[t]here was a gun on the floor, he [Kelly] was near it and they [the Philadelphia Police] arrested him for it." Id. at 71-72. Following his arrest, Cephas testified that Kelly "just kept on saying it wasn't his gun." Id. at 81. Cephas helped Kelly to find an attorney, explaining to him that "[i]f it wasn't your gun you need an attorney." Id. at 81-82. Cephas attended only the last day of Kelly's jury trial, when the verdict was read. Id. at 72-73.

Cephas testified that from May 1, 2004, the date of Kelly's arrest, to July 21, 2005, the date when his guilty verdict was rendered, she saw Jones and Gant socially. Id. at 74-75, 87. During this period, she did not speak with Jones or Gant about the charges against Kelly except to "mention[] [Kelly] was going to court." Id.

A "couple of weeks" after the verdict, and "later than a friend should have came back to a friend and told her something like this," Gant began a conversation with Cephas with the words, "I have something to tell you." Id. at 75-76. In that conversation, Cephas learned that Jones admitted to Gant that "it wasn't Jake's [Kelly's] gun."[5] Id. at 76. Until that moment, Cephas did not know that Jones was at Café Breezes on May 1, 2004. Id. at 82.

Cephas understood that this information might impact Kelly's case. Id. Accordingly, she called Kelly's lawyer, Mark E. Cedrone, who wanted to "send somebody over to talk to" Gant and Jones. Id. at 77. Gant initially refused to speak with any lawyer, but after "[a] couple weeks" changed her mind. Id. at 78. Cephas helped to facilitate the meetings between the investigator from Cedrone's office and Gant and Jones by providing Jones and Gant's contact information to

[5] Cephas also testified that she was "angry" and "hurt" by Gant's delay in sharing Jones's admission, but she understood what Gant had "been through in the past" as "a witness in something . . . that really exploded in her face by her trying to help someone." Id. at 83.

Cedrone. Id. at 78, 80.

At some point, Cephas confronted Jones about his admission. She testified about their exchange as follows:

> I confronted him [Jones] about it, pretty much. We didn't discuss anything, I didn't ask him what happened, what were the details. I pretty much went to him as a friend that was hurt, like "Why didn't you tell me? You could have told me before you told her [Gant]."

Id. at 79. In response, Jones did not say anything, but "just looked dazed and straight" and "as if he knew he was wrong." Id. at 80.

Before concluding her testimony, in response to questions from the Court, Cephas reiterated that she did not learn about Jones's statement about the gun until Gant approached her with that information. Id. at 87. She also emphasized that she did not speak with Jones about Kelly's arrest until after she learned of Jones's admission. Id. at 88.

C. Testimony of Victor Jones

Jones did not invoke his Fifth Amendment rights. Instead, he testified to the following:

He was a close friend of Cephas and Gant, and became a friend of Kelly as a result of his friendship with Cephas. Id. at 95-96. He explained that Café Breezes was the "hang-out spot" for the four of them during some period of time before Kelly's arrest on May 1, 2004. Id. at 97.

Jones was at Café Breezes during the early hours of May 1, 2004 "trying to get [him]self together" after spending a "couple hours, maybe two hours" drinking. Id. at 98, 118. He admitted that he "was drunk and the room was spinning." Id. at 122. At some time "past midnight," he was alerted that the police had entered Café Breezes because there was some "commotion." Id. at 98, 101-102. At that time, Jones had his elbow on the bar and was sitting next to Kelly at the corner of the bar closest to the door. Id. at 98, 119. Jones's bar stool was at the long end of the bar, and Kelly's bar stool was located on the left side of Jones's stool at the short end of the bar. Id. at 99-

100. According to Jones, "all the seats were filled. There were some, there was people standing in between the seats, there was people standing behind me. I didn't know the person who was sitting next to me [on the right side]." Id. at 100;see also id. at 119 ("There was people, there was people standing next to me, there were people standing behind me, there was people – there was people on both sides, there were people standing all around me. . . . . there was a lot of people there and the people who didn't have seats were standing up.").

Jones testified that after he noticed the police in the bar, the following sequence of events occurred:

> I was sitting at the bar. I had pretty much done drinking, I didn't want to drink any more, I was ready to go. There was a little bit of pushing, somebody pushed my shoulder, kind of like my back but people were brushing me all night. Somebody brushed into me and somebody put something in my lap and it was a gun. And I pushed it off of my lap onto the floor.

Id. 102. Jones then clarified that the weight of the gun "landed in [his] crotch area." Id. at 103. Jones initially said he was unsure about whether the gun had fallen from his right or left side, but finally said the gun dropped onto his lap "from probably the right side of me, more so than the left side of me." Id. at 102-03, 119. Jones "instantly recognized that it was a gun" and "immediately pushed it off [his] lap."[6] Id. at 103, 120. Jones did not recall the exact direction in

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[6] Jones testified about why his immediate response to the gun in his lap was to push it away. He explained that when he was about nineteen years old, as he stood outdoors:

> a guy walked up really fast to me and tried to hand me a gun. And when I realized what he was handing me I put my hands up and he handed it to the guy standing right next to me and he was shortly thereafter arrested. . . . I think the other guy got away.

Id. at 105; see also id. at 120 (". . . in that situation . . . I saw the person make eye contact with me as if they knew me but he didn't. And he tried to give it [the gun] to me and I pulled my hands back . . . . And the person standing next to me welcomed it and took it and he kept on walking past us . . . . a couple minutes later I realized the police were coming behind him and they arrested him . . . ."). This experience taught Jones to push the gun away immediately when it

which he pushed the gun, id. at 103, 132, but assumes that because he pushed it with his left hand, which is dominant, the gun fell in front of him and slightly to the left. Id. at 121. The gun hit the wood of the bar, and then "made a click, a clackety sound" as it hit the tile floors. Id. at 118, 121-22. When Jones turned around to spot the person who had dropped the gun into his lap, he "didn't perceive" "a facial reaction like acknowledgment that somebody did it." Id. at 124.

Jones observed Kelly's arrest for possession of the gun. Jones was "certain" that the gun for which Kelly was arrested "was the same" gun that Jones had pushed off his lap. Id. at 103-04. Jones watched the police seize the gun from the floor. Id. at 103. Jones believed that Kelly "was wrongly arrested," but did not say anything to the officers because he "didn't want to have anything to do with it." Id. at 106.

Thereafter, Jones saw Kelly on one to three occasions, but they did not discuss the incident of May 1, 2004. Id. at 124-25. During those times, Jones "really thought" that the case against Kelly "was over." Id. at 125. Jones testified, "I didn't know that he [Kelly] still had a case. When I saw him after that incident I assumed it was over." Id. Because Jones observed Kelly "doing his regular thing," Jones "didn't feel a need to discuss" the gun incident. Id.

Jones learned of Kelly's conviction from Gant. Id. at 107, 117. Like Gant, Jones testified that Gant visited his apartment, and during their conversation, she asked whether he had heard what happened to Kelly. Id. at 108-10. When Jones replied that he did not know what happened to Kelly, Gant reported that Kelly was in jail on the gun charge. Id. at 110, 117. Jones responded that was "fucked up because it [the gun] wasn't his." Id. at 110. When Gant asked how Jones knew that, Jones revealed what had happened. Id. at 110, 117.

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landed in his lap on May 1, 2004.

Jones testified that he did not feel comfortable talking with Cephas about the situation. Id. Cephas then asked Jones to speak to an investigator, but he initially refused. Id. at 111. Thereafter, an investigator telephoned Jones and then visited him. The investigator asked how Jones would respond if he were subpoenaed to testify in Court. Jones refused to "give a comment," and said he "would plead the Fifth [Amendment]" because he "didn't want to discuss it." Id. at 112.

Even as Jones testified, he stated, "I really didn't feel comfortable doing this [i.e., testifying] and I didn't really want to involve myself . . . ." Id. at 113. He reiterated:

> I didn't want to have anything to do with it. I was actually sorry that I told Kemah [Gant] but, you know, I thought about it, you know, and I just felt that it was the probably was the right thing to do . . . . The more I thought about it, the more I felt that I really didn't have anything to hide so I decided to say exactly what happened as well as I felt that I just didn't like the idea of you guys asking me questions and the best answer I came up with I plead the Fifth. I felt safer telling what happened than I did saying that.

Id. at 126; see also id. at 127-129. Jones did not return the telephone calls of government investigator Chris Lee. Id. at 130.

D. Testimony of Philadelphia Police Officer Clarence Clark

Philadelphia Police Officer Clarence Clark, a member of the Vice Squad, entered Café Breezes with Officer Fairbanks on an undercover operation at approximately midnight or 1 a.m. on May 1, 2004. Id. at 136-37. Officer Clark sat down on a bar stool directly to the right of Jones, and ordered a beer. Id. at 137-39. After some time passed, Officer Clark notified his supervisor to come to Café Breezes. Id. at 140. Corporal Drummond arrived, announcing that he and members of the vice squad would "do open inspection on the bar." Id. Officer Clark testified that there was no one standing behind him or the person to his left – i.e., Jones – when the police entered. Id. at 141, 143. Officer Clark denied hearing a gun drop to the floor. Id. at 141, 143. All he remembers

hearing is Officer Stewart yelling "gun." Id. at 143.

E. Conclusion of Hearing

At the conclusion of the hearing, the government requested an opportunity to file a supplemental brief. Defense counsel requested leave to file a declaration explaining the diligence issues, i.e., whether Mr. Kelly was diligent in bringing the newly discovered evidence to the Court's attention. The Court granted both requests.

Defense counsel submitted his declaration on diligence issues on June 15, 2006. The government filed its post-hearing brief on June 29, 2006, and defense counsel responded on July 21, 2006.

V. ANALYSIS

Federal Rule of Criminal Procedure 33 authorizes a district court to grant a new trial, inter alia, "if the interests of justice so require" and in the case of newly discovered evidence.[7] Kelly argues that a new trial is warranted because (1) trial counsel was ineffective; (2) the guilty verdict was against the weight of the evidence; (3) the Court erred by excluding Kelly's statement that "someone threw the gun at [him]"; and (4) newly discovered evidence, i.e., the prospective testimony of Jones, reveals Kelly's innocence. The Court examines those claims in

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[7] Federal Rule of Criminal Procedure 33, New Trial, provides:

> Defendant's Motion. (a) Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
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> Time to File. (b)(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case. (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

turn, and concludes that only the newly discovered evidence claim warrants a new trial.

A. Claim of Ineffective Assistance of Counsel

Kelly argues that his trial counsel's ineffectiveness violated his Sixth Amendment rights. Specifically, Kelly contends that trial counsel was aware of but failed to call essential witnesses – namely, Imean Collier, Tonya Davis, Sharon Mobley, and Michael Starr – who would have offered testimony inconsistent with Officer Stewart's testimony.[8] Pursuant to Federal Rule of Criminal Procedure 33(a), Kelly argues that his trial counsel's ineffectiveness warrants a new trial. The Court disagrees on the ground that Kelly's claim of trial counsel's ineffectiveness is premature.

The Court of Appeals for the Third Circuit has repeatedly stated a strong preference for litigating ineffective assistance of counsel claims in separate proceedings under 28 U.S.C. § 2255, rather than on direct appeal. See, e.g., United States v. Gaydos, 108 F.3d 505, 512 n.5 (3d Cir. 1997) ("We have emphasized our preference that claims of ineffectiveness of counsel be raised in a collateral proceeding under 28 U.S.C. § 2255.") (internal citations omitted); United States v. Sandini, 888 F.3d 300, 312 (3d Cir. 1989) ("We have repeatedly expressed our strong preference for reviewing allegations of ineffective assistance of counsel in collateral proceedings under 28 U.S.C. § 2255 rather than on direct appeal."); Government of Virgin Islands v. Forte, 806 F.2d 73, 77 (3d Cir. 1986) ("[H]e may not raise this [ineffective assistance of counsel claim] on direct appeal. This court has clearly established that a defendant must raise ineffective assistance of counsel in a collateral proceeding under 28 U.S.C. § 2255 in order that the district court may create a sufficient record for appellate review."); United States v. Zomber, 358 F.

[8] Indeed, trial counsel identified three of these potential witnesses – Imean Collier, Tonya Davis, and Sharon Mobley – during the voir dire process. Trial Transcript, July 19, 2005, 25.

Supp. 2d 442, 453 (E.D. Pa. 2005) (dismissing without prejudice an ineffective assistance of counsel claim on direct appeal on the ground that "the case law appears quite clear that ineffective assistance of counsel claims should be raised through a § 2255 petition rather than on direct appeal."). "The rational for this policy is that oft-times such claims involve allegations and evidence that are either absent from or not readily apparent on the record." United States v. Gambino, 788 F.2d 938, 950 (3d Cir. 1986).[9]

The Court heeds the repeated instructions of the Court of Appeals. Accordingly, the Court concludes that it is premature to rule on Kelly's ineffective assistance of counsel claim, and thus dismisses this claim without prejudice.

B. Claim That Verdict Was Against the Weight of the Evidence

Kelly next argues that the guilty verdict in his case was against the weight of the evidence. In support of this argument, Kelly points to numerous alleged inconsistencies in Officer Stewart's testimony, and Officer Miles's testimony which allegedly contradicts Officer Stewart's testimony. Pursuant to Federal Rule of Criminal Procedure 33(a), Kelly argues that because Officer Stewart's testimony was implausible, he is entitled to a new trial. The Court rejects this argument.

"A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted." United States v.

[9] There is an exception to the general rule. That exception allows a defendant to raise an ineffectiveness of counsel claim on direct appeal "where an objection has properly been made at trial, or, where the record clearly shows actual conflict of interest and objections made at trial did or should have put the trial court on notice that potential conflict existed." Government of Virgin Islands v. Zepp, 748 F.2d 125, 134 (1984). Kelly does not argue that the exception is applicable in his case.

Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (internal quotations and citations omitted). These motions are granted "sparingly and with caution . . . only in those really exceptional cases." United States v. Cox, 995 F.2d 1041, 1043 (11th Cir. 1993) (internal quotations and citations omitted). In United States v. Ferguson, 246 F.3d 129 (2d Cir. 2001), the Second Circuit explained, "it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment. An example of exceptional circumstances is where testimony is patently incredible or defies physical realities . . . ." Id. at 133-34.

After carefully reviewing the record, the Court concludes that any alleged inconsistencies in Officer Stewart's testimony do not constitute the type of exceptional circumstances that would warrant a new trial in Kelly's case. See Ferguson, 246 F.3d at 133-34. Officer Stewart's testimony was neither patently incredible nor did it defy physical realities. Id. For these reasons, the Court rejects Kelly's argument that a new trial is warranted because the jury verdict was against the weight of the evidence.

C. Claim of Erroneous Evidentiary Ruling

Kelly contends that the Court erred when it preliminarily ruled that defense counsel could not introduce into evidence Kelly's statement that "someone threw the gun at [him]." Pursuant to Federal Rule of Criminal Procedure 33(a), Kelly argues that this error warrants a new trial in his case. The Court concludes this argument is without merit.

Prior to trial, the government moved in limine to exclude Kelly's statement that "someone threw the gun at [him]." The Court addressed the motion after calling Kelly's case for trial on July 19, 2005. The Court preliminarily ruled that defense counsel could not inquire about the statement as either an excited utterance or a present sense impression because the record did

not disclose how much time had elapsed between the events that would qualify the statement as a hearsay exception and the uttering of the statement. The Court ruled that because the "record [was] not completely clear on the duration of time between the throwing – alleged throwing of the gun and the statement," defense counsel would be required to develop evidence concerning the length of time that had lapsed before introducing the statement at trial. Trial Transcript, July 19, 2005, 8-17. Defense counsel did not attempt to develop evidence concerning the time lapse, nor did defense counsel attempt to introduce the statement at trial. Accordingly, by Order dated July 20, 2005, the Court denied the government's motion in limine as moot.[10]

In light of the circumstances, the Court's preliminary ruling on the statement that "someone threw the gun at [Kelly]" was entirely appropriate. The Court rejects Kelly's argument that the evidentiary ruling is a ground for a new trial.

D. Claim of Newly Discovered Evidence

Pursuant to Rule 33(b), Kelly moves for a new trial on the ground that he has newly discovered evidence – namely, the prospective testimony of Victor Jones – which would probably produce an acquittal in his case. After a careful review of the record, the Court concludes that this claim warrants a new trial.

Rule 33(b)(1) states in relevant part: "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." In the Third Circuit, to determine whether a new trial based on newly discovered evidence should be

[10] The Order explained that "following argument in open court on July 19, 2005, the Court having given counsel guidelines for admissibility of the statement the Government sought to preclude by the Motion, and defendant not having raised the issue during cross-examination of the police officers called as witnesses by the Government or at any other time during the trial," the Motion was denied as moot.

granted, courts apply the following five-part test:

> (a) the evidence must be[,] in fact, newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) evidence relied on[] must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002) (quoting United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976)) (alterations in original); see also United States v. DiSalvo, 34 F.3d 1204, 1215 (3d Cir. 1994).

A defendant moving for a new trial "has a 'heavy burden' in meeting these requirements." United States v. Saada, 212 F.3d 210, 216 (3d Cir. 2000) (citing United States v. Ashfield, 735 F.2d 101, 112 (3d Cir. 1984)). Where there is "overwhelming evidence of guilt in the record," and a defendant is unable to establish each of the five requirements, a district court should deny a Rule 33 motion. United States v. Barbosa, 271 F.3d 438, 468 (3d Cir. 2001).

Kelly argues that he has met each of the five requirements for receiving a new trial based on newly discovered evidence. The government disagrees on two grounds, arguing (1) that Kelly was not diligent in bringing the evidence before the Court, and (2) that Jones's testimony is unlikely to produce an acquittal. The Court analyzes the five requirements in turn, and concludes that Kelly has met his heavy burden of establishing each requirement. Accordingly, the Court grants Kelly's motion for a new trial.

1. Kelly has established that the evidence was in fact newly discovered since trial.

Kelly argues that he discovered the prospective testimony of Jones only after the trial in his case was completed. At the evidentiary hearing on June 8, 2006, the testimony of three witnesses – Gant, Cephas, and Jones – corroborated Kelly's position. The government does not contest this issue, and has presented no evidence to the contrary. On the present state of the

record, the Court concludes that Kelly has met his burden of establishing that he discovered Jones's prospective testimony only after the conclusion of his trial.

2. Kelly has established that he was diligent in bringing the evidence before the Court.

Kelly contends that he was diligent in bringing Jones's prospective testimony to the Court's attention. In support of his position, he points to the testimony of three witnesses – Gant, Cephas, and Jones – and the sworn declaration submitted by his defense counsel. See "Declaration of Attorney Mark E. Cedrone." He argues that the sum of this evidence meets his heavy burden of establishing diligence. The government disagrees, arguing that Kelly "has not proffered any facts from which the Court could infer diligence on his part." Gov't Post-Hearing Br. 11. After a careful review of the record, the Court rejects the government's position, and concludes that Kelly has met his burden of establishing that he was diligent with respect to the newly discovered evidence.

The government's argument that Kelly failed to exercise reasonable diligence is based on the following: Kelly did not ask Jones what he may have witnessed the night of Kelly's arrest, although Jones was at the bar, Jones and Kelly were friends, and Kelly saw Jones regularly after the arrest.[11] The government contends that Kelly's indifference to investigating what Jones may have seen or known is fatal to his pursuit of a new trial.

Kelly responds that he cannot be faulted for failure to exercise diligence because he had no reason to believe that Jones had relevant knowledge or information about what happened on the night of May 1, 2004. Kelly points out that the government ignores Jones's credible

[11] There is conflicting testimony on how frequently Jones and Kelly saw each other after Kelly's arrest and before the trial. Jones testified that he saw Kelly only one to three occasions. Hearing Tr., June 8, 2006, 124-25. Cephas testified that she, Kelly, Gant, and Jones were in each others company up to twenty times after Kelly's arrest. Id. at 84-85.

testimony that, until Gant told him Kelly was in jail for the gun charge, Jones did not tell anyone that he had thrown the gun from his lap, a decision that was motivated by Jones's deep-seated desire not to get involved. Hearing Transcript, June 8, 2006, 113, 126-129. Kelly also argues that he brought Jones's admission to the Court's attention as soon as possible, and refers to his attorney's sworn declaration, as well as the testimony of Gant, Cephas, and Jones, in support of this claim.

Based on the present state of the record, the Court finds that the events relating to Jones's prospective testimony occurred in the following sequence:

Kelly was found guilty of possession of the gun at issue on July 21, 2005. At that time, Kelly did not know about Jones's contact with the gun. On or about July 28, 2005, Gant visited Jones. During their conversation, she conveyed that Kelly was in prison on the gun charge. At that time, Jones revealed that he had thrown the gun to the floor after the police arrived at Café Breezes on the night of Kelly's arrest.

On August 1, 2005, Cedrone replaced Kelly's trial counsel and filed a Motion for New Trial and Leave to Supplement pursuant to Federal Rule of Criminal Procedure 33. At some time in mid-August 2005, Gant called Cephas to tell her what Jones had revealed. "Sometime in mid-August to early September" of 2005, Cephas called Cedrone, Kelly's counsel. Declaration of Attorney Mark E. Cedrone, ¶ 8. Cedrone returned Cephas's call after September 5, 2005. Id. Cedrone then told Cephas it was imperative to obtain statements from Gant and Jones. Id. Shortly thereafter, Cedrone contacted Willard Brown, a private investigator, and instructed Brown to work with Cephas to obtain statements from Gant and Jones. Id. at ¶ 9. Brown attempted to interview Gant and Jones. Id. at ¶ 10. He met with Gant on October 4, 2005. On that date, Gant executed a statement, which was filed with Kelly's Supplemental Post-Verdict Motion

on October 6, 2005. Id. at ¶ 11. On October 6, 2005, Brown spoke with Jones by telephone, and Jones stated that he intended to invoke his Fifth Amendment privilege against self-incrimination. Id. at ¶ 12.

After considering this sequence of events – which the government has not contradicted – the Court concludes that Kelly was diligent in bringing Jones's testimony to the Court's attention. The testimony of Gant, Cephas, and Jones, and the sworn declaration of Cedrone make clear that Kelly brought Jones's prospective testimony to the Court's attention as soon as possible. Any delay in bringing Jones's prospective testimony to the Court's attention cannot be attributed to Kelly. Compare United States v. Morales, 1991 WL 276022, *1 (E.D.Pa. 1991) (Weiner, J.) (concluding that where the defendant's wife had not spoken with a newly discovered witness about the defendant until almost two years from the date of defendant's arrest and until after the defendant was found guilty, any delay in the new witness coming forward could not be attributed to the defendant's lack of diligence). The government's claims to the contrary – for which no evidence has been offered – are unavailing.

3. The evidence is not merely cumulative or impeaching.

Kelly argues that Jones's testimony would not be merely cumulative or impeaching. The government does not contest this issue. The Court concludes that Kelly has met his burden of establishing this requirement because Jones's proposed testimony would directly contradict that of the government's key witness, Officer Stewart, on the issue of whether the gun fell from Kelly's lap.

4. The evidence is material to the issues involved.

Kelly argues that Jones's testimony is material to whether Kelly possessed the gun on the night of his arrest. The government does not contest this point. The Court concludes that Jones's

testimony is certainly material to the issues involved. As noted above, Kelly's conviction was based entirely on the testimony of Officer Stewart. Jones's proposed testimony is material because it would directly contradict that of Officer Stewart.

5. The newly discovered evidence would probably produce an acquittal.

Kelly argues that Jones's testimony would probably produce an acquittal. The government disagrees, and urges the Court to conclude that Jones's testimony is simply not credible. The Court rejects the government's position and declines to make such a credibility determination at this juncture. For the reasons explained below, the Court concludes that Kelly has met his burden of establishing that Jones's prospective testimony, if believed, would probably produce an acquittal, and the jury is the appropriate fact-finder.

The government first argues that Jones's prospective testimony "is simply too fantastic to be accorded much evidentiary weight," because it conveniently absolves both Kelly and Jones of any criminal liability. Gov't Post-Hearing Br. 13-14. The government then points to alleged inconsistencies in the testimony of Jones, Gant, and Cephas at the evidentiary hearing on June 8, 2006. The government further submits that Jones's friendship with Kelly gives Jones a strong motive to lie, and that Jones's admission that he was intoxicated undermines his credibility. Finally, the government states that, at a new trial, it would present evidence from Officers Stewart, Miles, and Clark to contradict Jones's testimony. In support of its position that the Court should conclude that Jones's proposed testimony is not credible, the government relies on In re Rutherford, 437 F.3d 1125 (11th Cir. 2006), United States v. Rouse, 410 F.3d 1005 (8th Cir. 2005), and United States v. Grey Bear, 116 F.3d 349 (8th Cir. 1997).

The Court concludes that none of the cases cited by the government – In re Rutherford, 437 F.3d 1125 (11th Cir. Jan. 30, 2006), United States v. Rouse, 410 F.3d 1005 (8th Cir. 2005),

and United States v. Grey Bear, 116 F.3d 349 (8th Cir. 1997) – control the analysis at issue in this case. Those cases are distinguishable because each one concerns newly discovered evidence in the form of recanted trial testimony, which is not at issue in Kelly's case. The Court examines those cases in turn.

First, In re Rutherford is completely inapposite to this case. In that case, the Eleventh Circuit, in the context of evaluating affidavits submitted in a death penalty case, applied the 28 U.S.C. § 2244(b)(2)(B)(ii) standard[12] to conclude that the Florida Supreme Court did not err in concluding that recanted statements made by a person who had once claimed that she was the murderer – and that the capital defendant was innocent – were unbelievable. See In re Rutherford, 137 F.3d at 1127; Rutherford v. State, 926 So. 2d 1100 (Fla. Jan. 27, 2006). Whether newly discovered evidence is believable under Florida law or 28 U.S.C. § 2244(b)(2)(B)(ii) is not at issue in Kelly's case, where the relevant standard is Federal Rule of Criminal Procedure 33(b)(1).

Second, Grey Bear, which arose in the context of recanted witness testimony in a case where the defendants were convicted of witness tampering, undercuts the government's own argument. The Eighth Circuit in Grey Bear emphasized that "the real question" in evaluating newly discovered evidence supporting a motion for a new trial was "not whether the district judge believed the recantation, but how likely the district judge thought a jury at a second trial

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[12] 28 U.S.C. § 2244(b)(2)(B)(ii) states:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

would be to believe it." 116 F.3d at 351 (emphasis added). This ruling makes clear that the second jury – not the district judge – should evaluate the credibility of newly discovered evidence, if the defendant meets certain threshold criteria. Grey Bear does not support the government's argument that this Court should find Jones's testimony not to be credible.

Third, in Rouse, the Eighth Circuit reiterated the holding in Grey Bear that the appropriate evaluator of the credibility of newly discovered evidence is the second jury, not the district judge. In Rouse, which involved the sexual abuse of children, the Eighth Circuit explained that "we view with suspicion motions for new trial based on the recantation of a material witness. . . . . This skepticism is especially applicable in cases of child sex abuse." 410 F.3d at 1008. Clearly, that conclusion is not relevant to Kelly's case.

Having distinguished each of the cases on which the government relied, the Court notes that the government has not cited a single non-recantation cases which addresses whether a district court should pass on the credibility of newly discovered evidence in determining whether such evidence would result in an acquittal at a new trial. There is, however, one case on point in this district, United States v. Morales, 1999 WL 276022 (E.D. Pa.) (Weiner, J.). In Morales, Judge Weiner granted a new trial based on newly discovered evidence, although it had "many inconsistencies," because the "defendant is entitled to have a jury evaluate the credibility of [the newly discovered evidence]." Id. at *2.

The Court adopts the Morales approach in this case. Although the Court has some reservations about Jones's proposed testimony – notably, it nicely absolves both Kelly and Jones of criminal liability and it surfaced at a convenient time – the Court, out of an abundance of

caution,[13] concludes that Kelly is entitled to have a jury evaluate the credibility of Jones. The Court further concludes that a jury is likely to find Jones's prospective testimony credible for, inter alia, the following reasons: First, it is not logical for Jones to perjure himself for the boyfriend (Kelly) of one of his friends (Cephas). Second, Jones had a strong motive not to come forward and to avoid discussing the incident until Gant reported that Kelly had been convicted. Third, Jones cannot benefit by falsely helping Kelly. Fourth, some time after the arrest but while still at the bar, Kelly stated "someone threw the gun at [him],"[14] which corroborates Jones's prospective testimony.

If a jury finds Jones's testimony to be credible, the Court concludes the jury is likely to have a reasonable doubt as to whether Kelly possessed the gun at issue during the early hours of May 1, 2004 at Café Breezes. Compare United States v. Morales, 1991 WL 276022, *2 (E.D.Pa. 1991) (Weiner, J.). Thus, Kelly has established that the newly discovered evidence is likely to produce an acquittal.

In sum, Kelly has met his heavy burden of establishing each of the five requirements for a new trial based on newly discovered evidence pursuant to Federal Rule of Criminal Procedure 33(b)(1). United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002); United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976). Accordingly, the Court grants Kelly's motion for a new trial.

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[13] The consequence of Kelly's conviction for the instant offense is significant because it would qualify Kelly for Armed Career Criminal status and a mandatory minimum sentence of fifteen years. 18 U.S.C. § 924(e).

[14] The Court's consideration of the statement "someone threw the gun at [him]" does not necessarily mean that the statement will be admitted at Kelly's new trial. Defense counsel must develop foundation evidence regarding the time lapse between the alleged throwing of the gun and Kelly's statement in order for the Court to determine whether the statement qualifies as an excited utterance or a present sense impression.

VI. CONCLUSION

For the foregoing reasons, the Court grants in part, denies in part, and dismisses in part the claims raised in Kelly's motion for a new trial. The Court dismisses without prejudice Kelly's claim of ineffective assistance of counsel. The Court denies Kelly's claims that his guilty verdict was against the weight of the evidence and that the Court erred by preliminarily excluding Kelly's statement that "someone threw the gun at [him]." Finally, the Court grants Kelly's motion for a new trial based on newly discovered evidence because Kelly has established that Jones's prospective testimony was in fact discovered after trial; Kelly was diligent in bringing the evidence to the Court's attention; Jones's prospective testimony is not merely cumulative or impeaching, but instead is material, and, if believed, is likely to produce an acquittal.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
v.	:	
JAKE KELLY	:	**NO. 04-605**

O R D E R

AND NOW, this 29th day of August, 2006, upon consideration of the Defendant's Motion for New Trial and Leave to Supplement (Document No. 71, filed August 1, 2005), the Defendant's Supplemental Post-Verdict Motions (Document No. 78, filed October 6, 2005), the Government's First Response to Defendant's Post Trial Motions (Document No. 81, filed February 6, 2006), the Defendant's Reply to the Government's First Response to Defendant's Post- Trial Motions (Document No. 90, filed March 14, 2006), the Declaration of Attorney Mark E. Cedrone (Document No. 100, filed June 15, 2006), the Government's Post-Hearing Brief in Opposition to Defendant's Motion for New Trial (Document No. 102, filed June 29, 2006), the Defendant's Reply to Government's Post Hearing Brief in Opposition to Defendant's Motion for New Trial (Document No. 103, filed July 21, 2006), and the testimony of Kemahsiah Gant, Jacquelyn Cephas, Victor Jones, and Philadelphia Police Officer Clarence Clark at the evidentiary hearing on June 8, 2006, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that the Defendant's Motion for New Trial is **GRANTED IN PART, DENIED IN PART, AND DISMISSED IN PART**, as follows:

1. Kelly's claim of ineffective assistance of counsel is **DISMISSED WITHOUT PREJUDICE**;

2. Kelly's claims that his guilty verdict was against the weight of the evidence and that the Court erred by preliminarily excluding Kelly's statement that "someone threw the gun at [him]" are **DENIED**;

3. Kelly's claim that newly discovered evidence – specifically, the prospective testimony of Victor Jones – warrants a new trial is **GRANTED**.

IT IS FURTHER ORDERED that the case is **SPECIALLY LISTED FOR TRIAL** to commence on, Monday, November 6, 2006, at 10:00 A.M.. in Courtroom 12-B U.S. Courthouse, 601 Market Street, Philadelphia, Pennsylvania.

The following attorneys are **ATTACHED** for trial:

Leo R. Tsao, Assistant U.S. Attorney
Counsel for the Government; and,

Mark E. Cedrone,
Counsel for Defendant, Jake Kelly.

The estimated trial time is three (3) to four (4) days.

IT IS FURTHER ORDERED that, on or before October 23, 2006, the parties shall file and serve:

1. Any supplemental proposed jury voir dire questions; and,

2. Any supplemental proposed jury instructions with citations of authority for each instruction (ONE (1) instruction PER PAGE). If a model jury instruction taken, for instance, from O'Malley, Grenig & Lee, Federal Jury Practice and Instructions or Sand, Modern Federal Jury Instructions, is submitted, the parties shall state whether the proposed jury instruction is unchanged or modified. If a party modifies a model jury instruction the modification shall be set forth in the following manner: additions shall be underlined and deletions shall be placed in brackets;

3. Two (2) copies of all documents identified in paragraphs 1 and 2 above shall be served on the Court (Chambers, Room 12613) when the originals are filed.

BY THE COURT:

/s/ JAN E. DUBOIS, J.

JAN E. DUBOIS, J.